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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, Successor in office to RICHARD T. SILBERMAN, as Secretary of the Business and Transportation Agency of the State of California,

Appellant,

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California Corporation, *et al.*, and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE AMERICAN SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE IN SUPPORT OF MOTIONS OF APPELLEES TO DISMISS OR AFFIRM

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TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Savings and Loan League ("American League") hereby moves, pursuant to Rule 42(3) of the Rules of the United States Supreme Court, for leave to file

the within "BRIEF OF THE AMERICAN SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE IN SUPPORT OF MOTIONS OF APPELLEES TO DISMISS OR AFFIRM", and as grounds therefor alleges as follows:

I

The American League is a trade association composed of savings and loan associations in the United States which are owned and operated predominantly by Blacks, Hispanics, Orientals, and members of other racial or ethnic minorities. Formed more than 31 years ago, its current membership includes 70 savings and loan associations operating in 24 states and the District of Columbia and having assets in excess of $1.5 billion. More than half of the members are federally-chartered associations. Eighteen of the members are located in California.

II

As a trade association composed of minority owned and operated savings and loan associations, the American League is dedicated to ending the practice of "redlining" and other forms of arbitrary discrimination against racial and ethnic minorities, and promoting the availability of mortgage credit to members of racial and ethnic minorities for the purchase of homes and other real estate. Over the years, the American League has, through lobbying, education, litigation, and other means, vigorously—and effectively—endeavored to achieve these goals.

III

This appeal concerns the respective roles of the Federal Home Loan Bank Board ("Bank Board") and the several states in regulating the mortgage lending practices

of federal associations. In particular, it presents the question of whether the United States Court of Appeals for the Ninth Circuit erred in holding that a federal law, the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. § 1464(a), and the comprehensive body of regulations which the Bank Board has issued thereunder, bars the State of California from enforcing certain procedural requirements of the California "antiredlining" statute (Calif. Health & Safety Code § 35800 *et seq.*) against federal savings and loan associations. Since resolution of this question will affect the ability of members of racial and ethnic groups to secure mortgage credit, it is a matter of material concern to the American League and its members.

IV

The American League is familiar with the contents of 1) the "JURISDICTIONAL STATEMENT" filed by the Appellant in the within appeal; 2) the "BRIEF OF AMICI CURIAE" in support of the Appellant's jurisdictional statement filed by the State of Washington, and joined in by 27 other state (and territorial) attorneys general, which, among other things, questions the constitutionality of the federal savings and loan system; and 3) the "MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC." filed by the N.A.A.C.P. Legal Defense and Educational Fund in support of the Appellant's jurisdictional statement.

V

The American League believes that the decision being appealed of the United States Court of Appeals for the Ninth Circuit ("the Court of Appeals") was legally

correct and in the best interests all of the people of the United States, including members of racial and ethnic minorities. In its *amicus curiae* brief in support of the respective motions of the Appellees to dismiss this appeal or affirm the judgment of the Court of Appeals the American League will argue the following points:

1. The sole issue addressed by the jurisdictional statement of the Appellant, the application to federal savings and loan associations of the California "antiredlining" statute *per se,* is not presented by this appeal.

2. Since the Bank Board has issued and is enforcing a stringent body of "antiredlining" and "antidiscrimination" regulations, allowing the State of California to impose upon federal associations the procedural requirements of the California "antiredlining" statute would not contribute in any meaningful fashion—and, indeed, could be inimical—to the elimination of "redlining" and other discriminatory lending practices.

3. The extreme position taken by one of the amici, questioning the constitutionality of the federal savings and loan system, by casting doubt (however unfounded) on the legal status of federal associations, could have an adverse influence upon their operations and thus impair their ability to provide mortgage credit to the public, including minority group members.

4. Because of its possible precedential effect with respect to the application of state law to other mortgage lending practices of federal associations, particularly the right of federal associations to exercise "due on" clauses in mortgage loan contracts, a

reversal of the judgment of the Court of Appeals could constrict the availability of mortgage credit to minority group members and other economically disadvantaged persons.

VI

The American League believes that argument on the above-referenced points will assist the Court in determining whether or not to dismiss this appeal or affirm the judgment of the Court of Appeals from which the appeal is taken; and the American League is concerned that these points either will not be addressed, or will not be adequately addressed, in the motions to dismiss or affirm that will be filed by the Appellees.

VII

The American League has asked for the consent of all parties to this appeal to the filing of an *amicus curiae* brief. While the Appellees have given their written consent, the Appellant has refused to give his consent except upon conditions.

Wherefore, the American League prays that the attached *amicus curiae* brief be filed.

Respectfully submitted,

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By _____
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I

INTEREST OF AMICUS CURIAE

The American Savings and Loan League ("American League") is a trade association composed of savings and loan associations in the United States which are owned and operated predominantly by Blacks, Hispanics, Ori-

entals, and members of other racial or ethnic minorities. Formed more than 31 years ago, its current membership includes 70 savings and loan associations operating in 24 states and the District of Columbia and having assets in excess of $1.5 Billion. More than half of the members are federally-chartered associations. Eighteen of the members are located in California.

As a trade association composed of minority owned and operated savings and loan associations, the American League is dedicated to ending the practice of "redlining" and other forms of arbitrary discrimination against racial and ethnic minorities, and promoting the availability of mortgage credit to members of racial and ethnic minorities for the purchase of homes and other real estate. Over the years, the American League has, through lobbying, education, litigation, and other means, vigorously—and effectively—endeavored to achieve these goals.

This appeal concerns the respective roles of the Federal Home Loan Bank Board ("Bank Board") and the several states in regulating the mortgage lending practices of federal associations. In particular, it presents the question of whether the United States Court of Appeals for the Ninth Circuit erred in holding that a federal law, the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. §1464(a), and the comprehensive body of regulations which the Bank Board has issued thereunder, precludes the State of California from enforcing certain procedural requirements of the California "antiredlining" statute (Calif. Health & Safety Code §35800 *et. seq.*) against federal savings and loan associations. Since resolution of this question will affect the ability of members of racial and ethnic groups to secure mortgage credit, it is a matter of material concern to the American League and its members.

II

ARGUMENT

A. The Sole Issue Addressed by the Jurisdictional Statement of the Appellant, the Application to Federal Savings and Loan Associations of the California "Antiredlining" Statute *per se*, Is Not Presented by This Appeal.

In his jurisdictional statement the Appellant asserts that the question presented by this appeal is whether the California "antiredlining" statute *per se* applies to federal associations. Only in a footnote does he acknowledge that the United States Court of Appeals for the Ninth Circuit ("the Court of Appeals") decided only the question of whether the *procedural* aspects were applicable; and he proceeds to dismiss the careful distinction drawn by the Court of Appeals between the procedural and substantive aspects of the statute as "inexplicable". (Jurisdictional Statement, p. 6, footnote 2.)

What the Appellant fails to disclose is that *the State of California drew precisely the same distinction between the substantive and procedural aspects of the California "antiredlining" statute vis-a-vis its application to national banking associations*—associations which have vastly greater assets and are far more important mortgage lenders in California than federal savings and loans associations.

By a letter dated June 19, 1979, the Comptroller of the Currency, in response to efforts by the State of California to apply its "antiredlining" statute to national banking associations, advised the Governor, Edmund G. Brown, that the *procedural* aspects of the California "antiredlining" statute were preempted in the case of

national banking associations by federal law; but that the Comptroller would himself require such associations to comply with the *substantive* provisions of the statute:

> "We have reviewed the law and have concluded that the substantive nondiscrimination provisions contained in (Health & Safety Code) §§35810-12 do apply to national banks. However, the state's enforcement mechanism and complaint resolution process are preempted in the case of national banks by the Comptroller's congressionally-mandated regulatory and supervisory responsibilities.
>
> "We will examine national banks for compliance with the state law substantive requirements and will administratively resolve individual consumer complaints under our established fair housing program. We are instructing the San Francisco Regional Office to advise national banks and national bank examiners of our findings and to develop appropriate examination procedures."

We have been advised that the State of California has acquiesced in the position of the Comptroller that the procedural aspects of the California "antiredlining" statute do not apply to national banking associations.

In short, the distinction drawn by the Court of Appeals between the substantive and procedural aspects of the California "antiredlining" statute is reasonable and has been accepted by the Appellant. Accordingly, the jurisdictional statement of the Appellant, by addressing the question of the application to federal associations of the California "antiredlining" statute *per se,* obviously addresses an issue which simply is not presented by this appeal.

B. Since the Bank Board Has Issued and is Enforcing a Stringent Body of "Antiredlining" and "Antidiscrimination" Regulations, Allowing the State of California to Impose Upon Federal Associations the Procedural Requirements of the California "Antiredlining" Statute Would not Contribute in any Meaningful Fashion—and, Indeed, Could Be Inimical—to the Elimination of "Redlining" and Other Discriminatory Lending Practices.

A basic thesis of both the jurisdictional statement filed by the Appellant and the *amicus curiae* briefs of the attorneys general and the N.A.A.C.P. Legal Defense and Educational Fund, Inc. filed in support thereof is that application of the California "antiredlining" statute to federal associations would materially contribute to the elimination of "redlining" and other discriminatory lending practices.

That thesis, the American League, believes, is spurious.

There is little evidence that discriminatory lending practices are widespread among federal associations in California or elsewhere at the present time. Rather, and whatever the past may be, the American League is gratified at the determined effort that federal associations in general have made in recent years to eradicate discrimination in lending and to increase the availability of mortgage credit to members of the minority community.

To the extent that discriminatory lending practices by federal associations may remain a problem, the Bank Board has issued and is enforcing a stringent body of "antiredlining" and "antidiscrimination" regulations. Moreover, because of its plenary authority over the

operation of federal associations (see 12 U.S.C. §1464(a))—including such matters as association branching and establishment of other offices and facilities[1]—the "leverage" of the Bank Board to enforce compliance with regulations is generally superior to the ability of a state official to enforce compliance with an "antiredlining" state law.[2]

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[1] Under the Community Reinvestment Act of 1977, 12 U.S.C. §§2901-2905, the Bank Board is authorized to take into account the lending record of a federal association, including its service to low- and moderate-income neighborhoods, in evaluating an application by a federal association for a deposit facility. This includes applications for branch offices, remote electronic service units, office location changes, mergers, consolidations, reorganizations, and holding company acquisitions, among others. The possibility of denial by the Bank Board of such applications for poor lending performance in low- and moderate-income neighborhoods, which often are also minority neighborhoods, is a powerful deterrent to redlining by a federal association. The Bank Board's regulations implementing the Community Reinvestment Act appear at 12 C.F.R. Part 563e.

[2] This appeal arises out of a dispute between two sovereigns, the United States of America acting through the Bank Board and the State of California acting through one of its officials, the Secretary of the Business and Transportation Agency of the State of California, over the right to regulate the mortgage lending practices of federal savings and loan associations.

Following enactment of the California "antiredlining" statute, the Appellant (or, more precisely, his predecessor in office) informed federal associations in California that he expected them to comply with the provisions of the California "antiredlining" statute; the Bank Board thereupon issued an opinion that federal law precluded application of the California "antiredlining" statute; and the nongovernmental Appellees in this appeal attempted to secure an orderly resolution of the controversy by filing an action in the United States District Court for the Eastern District of California seeking, *inter alia,* declaratory relief against both the Bank Board and the Secretary of Business and Transportation Agency of the State of California. (*Conference of Federal Savings and Loan Associations, et al. v. Richard T. Silberman etc.,* U.S.D.C. S-78-55 PCW.)

(footnote continues)

Indeed, the existence of concurrent jurisdiction by the Bank Board and the individual states—each with its own independent enforcement process—over "redlining" violations could result in public confusion as to the appropriate enforcement authority that would actually inhibit effective enforcement by the Bank Board and thus be inimical to the elimination of "redlining" and other discriminatory lending practices. The American League would not like to see a situation arise where federal associations in states which do not have effective antiredlining laws attempt to evade the Bank Board's salutary antiredlining regulations on the ground that state law governs this issue.

C. The Extreme Position Taken by One of the Amici, Questioning the Constitutionality of the Federal Savings and Loan System, by Casting Doubt (However Unfounded) on the Legal Status of Federal Associations Could Have an Adverse Influence upon their Operations and Thus Impair Their Ability to Provide Mortgage Credit to the Public, including Minority Group Members.

The federal savings and loan system has been in existence for almost half a century; and during that time it has played a leading and vital role in home financing. Indeed, without the federal savings and loan system, it is

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(footnote continued)

Instead of awaiting the outcome of the federal court action however, the State of California attempted to coerce compliance with the California "antiredlining" statute by bringing a state court action against a single moderate size federal association, West Coast Federal and Loan Association, and 100 "Doe" defendants who were presumably the other federal associations in California, seeking to impose penalties amounting to, on an annualized basis, about one billion dollars a year. (*People, etc. v. West Coast Federal Savings and Loan Association, et al.,* San Mateo County Superior Court No. 220012.)

doubtful that Americans would have the quantity and quality of housing which they presently enjoy. Moreover, federal associations, both minority operated and non-minority operated, have often been in the forefront of efforts to provide mortgage credit to minority group members and others living in mortgage-deprived areas.

Despite the fact that it has existed for almost fifty years and has over $325 billion in assets, despite the enormous contribution which it has made to the well-being of the nation, despite the enormous contribution which it may be expected to make in the future, the attorneys general of 28 states have asserted, in an *amici curiae* brief filed in this appeal, that the federal savings and loan system may not be constitutional. ("Brief of Amici Curiae," pp. 7-10.)

Obviously the federal savings and loan system is *not* unconstitutional and any claim to the contrary is simply irresponsible. Nevertheless, the mere existence of that charge, when made by 28 state (or territorial) attorneys general in a brief before this Court, will necessarily cast doubt about the legal status of federal associations, which could have an adverse influence upon their operations. What will happen, for example, when a federal association attempts to borrow funds on the security of its credit? Will the lender demand an extra premium to compensate it for the additional risk of extending credit to what may be an organization without lawful status? If so, would it still be economically feasible for the association to borrow? Could the association remain competitive with other mortgage lenders, including state-chartered savings and loan associations?

In short, the mere existence of the charge that federal associations are unconstitutional may be harmful to the

operations of federal associations and thus impair the ability of those associations to provide mortgage credit to anyone, including members of minority groups living in mortgage deprived areas.[3] It creates a practical urgency for securing a prompt disposition of the within appeal either by dismissing it or affirming the Court of Appeals' judgment from which it is taken.

D. Because of its Precedential Effect with Respect to the Application of State Law to Other Mortgage Lending Practices of Federal Associations, Particularly the Right of Federal Associations to Exercise "Due On" Clauses in Mortgage Loan Contracts, A Reversal of the Judgment of the Court of Appeals Could Constrict the Availability of Mortgage Credit to Minority Group Members and Other Economically Disadvantaged Persons.

The principal focus of both the Appellant's jurisdictional statement and the *amicus curiae* briefs filed in support thereof is the application of state "antiredlining" statutes to federal savings and loan associations. In fact, however, this appeal presents only one aspect of the broader question of which sovereign, the United States of America, acting through the Bank Board, or the several states, may regulate the mortgage lending practices of federal associations, not merely with respect to "redlining" but with respect to other matters as well; and the disposition of this appeal could have important implications for the resolution of that broader controversy.

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[3] It should be noted that historically the ratio of federal charters to nonfederal associations has been higher for minority associations than for others. Hence, the effect of the charge upon minority savings and loan associations will be even more severe than on savings and loan associations in general.

More particularly, Bank Board regulations, 12 C.F.R. § 545.8-3(f) and (g), subject to specified limitations, explicitly authorize federal associations to exercise "due on" clauses in mortgage loan contracts for the purpose of adjusting the yield on a loan to current market levels when the property (or a sufficient interest therein) is sold or transferred. California law, however, as interpreted by the California Supreme Court in *Wellenkamp* v. *Bank of America,* 21 Cal.3d 943 (1978), prohibits said exercise; and the Appellant contends that the state prohibition applies to federal associations.[4]

The American League believes that the right of federal associations to exercise the "due on" clause for the purpose of adjusting interest rates contributes to the availability of mortgage credit to minority group members and other economically disadvantaged persons. A prohibition against exercise of a "due on" clause tends to perpetuate the existing distribution of mortgage credit. This perpetuation because of the effects of past "redlining" and other discriminatory lending practices, operates to keep credit in areas which already enjoy an abundance of housing funds while inhibiting lenders, whether acting voluntarily or under legal compulsion, from diverting such funds to mortgage-deprived areas.

[4] Indeed, the action originally brought by the non-governmental Appellees in the United States District Court for the Eastern District of California to secure a declaration of rights with respect to the application of the California "antiredlining" statute also sought a declaration that federal law precluded the application of the California law to federal associations. While the two issues were eventually severed, the District Court has determined that federal law does preclude such application; and an appeal by the Appellant to the Court of Appeals is pending.

Thus, because of its possible precedential effect with respect to the application of state law to the right of federal associations to exercise the "due on" clause in mortgage loan contracts, a reversal of the judgment of the Court of Appeals could constrict the availability of mortgage credit to minority group members and other economically disadvantaged persons.

There could be other substantially adverse precedential consequences of weakening an unbroken line of court cases holding that federal law exclusively governs the lending operations of federal savings and loan associations. The Bank Board strictly limits the amount of late charges which may be assessed by federal associations on delinquent borrowers, and allows a 15-day grace period before a late charge may be assessed. See 12 C.F.R. § 545.8-(3)(d) and (e).[5] Most states, however, impose no late charge limitations, or allow a late charge above the limitation imposed by the Bank Board. If the exclusive nature of the Bank Board's Regulations are placed in doubt, efforts could be made to follow state late charge practices. This, in turn, could adversely impact minority groups, since they often are more affected by a down-turn in the national (or regional) economy than are majority groups.

Finally, Congress appears well satisfied with the Bank Board's regulation of federal associations, and has recognized that federal law *exclusively* governs antidiscrimination and lending by federal associations. See 124 Cong. Rec. Senate, October 12, 1978, pp. 18471-18472; 124 Cong. Rec. House, October 5, 1978, pp. 11744-11745.

[5] Prior to August 3, 1979, the Bank Board's due-on-sale and late charge regulations were found at 12 C.F.R. §545.6-11(d)-(g).

III

CONCLUSION

This appeal should be dismissed or, alternatively, the judgment of the Court of Appeals affirmed.

Respectfully submitted,

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